ALLIEDBANK (MALAYSIA) BHD

v.

YAU JIOK HUA

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CIVIL SUIT NO: 22-5-91]
23 JANUARY 1998

CIVIL PROCEDURE: *Service - Notice of demand - Whether personal or substituted service - Whether mode of service depends on agreement between parties*

EVIDENCE: *Hearsay - Documentary hearsay - Exception to hearsay rule - Application of s. 32(1)(b) of Evidence Act 1950 - Whether conditions fulfilled*

EVIDENCE: *Hearsay - Documentary hearsay - Exception to hearsay rule - Application of s. 73A of Evidence Act 1950 - Whether conditions fulfilled*

EVIDENCE: *Hearsay - Documentary hearsay - Exception to hearsay rule - Distinction between ss. 32(1)(b) and 73A of Evidence Act 1950*

WORDS & PHRASES: *"Record" - "Continuous record" - Evidence Act 1950, s. 73A(1)(a)(ii)*

The plaintiffs, by their writ dated 9 January 1991, instituted proceedings against the defendant for the recovery of the sum of RM1,192,484.83 as of 30 November 1990. The plaintiffs claimed that they had granted a loan to the defendant by way of an overdraft account in the sum of RM500,000. The defendant did not dispute the overdraft facility but contended that the notice of demand had not been sent to him while the plaintiffs contended that it had been done so. The plaintiffs attempted to prove service of several notices of demand on the plaintiff allegedly by way of AR registered post – through the evidence of PW1 – an advocate and solicitor attached to a law firm, M/s Nordin Hamid & Co, and through PW2, the plaintiff's manager.

PW1 stated that he had no personal knowledge of the plaintiffs having been clients of his firm and that whatever knowledge he had was only through records from his office which showed that the plaintiffs were clients. According to the records, a letter of demand was sent by AR registered post. A copy of the letter of demand and the AR card was produced to show that the letter had been received.

PW2, on the other hand, had personal knowledge of the subject matter of the case. He stated that letters of demand were issued on his behalf by the law firm and that the solicitor handling the matter for the plaintiff was one Mr Thavarajah, who was now in Australia. PW2 said that he did consider looking for Mr Thavarajah in Australia but did not do so as, firstly, his exact whereabouts were not known and, secondly, it would not be cost-effective to bring him down for the trial of this case. Furthermore, he did not know how long it would take him to locate Mr Thavarajah in the event that he had to do so. PW2 confirmed that the contents of the letters of demand were within his personal knowledge and that the authors were M/s Nordin Hamid & Co.

The plaintiffs sought to admit the evidence through ss. 32(1)(b) and 73A of the Evidence Act 1950 ('the Act'). The defendant objected to the admissibility of the documents as it had not been established who the author of the documents was. Furthermore, no evidence was adduced to establish the efforts taken to locate the witness.

Held:

[1] Where a document is sought to be proved in order to establish the truth of the facts contained therein, the maker has to be called. Non-compliance with this rule will result in the contents of the document being hearsay.

[2] Both ss. 32(1)(b) and 73A of the Act are exceptions to the hearsay rule. While s. 32(1)(b) is confined in its operation to a statement which is based on the personal knowledge of the maker, s. 73A makes express provision for the admissibility of the statement even when its maker does not have personal knowledge of its contents though the supplier of the information to the maker must have had such knowledge. Section 32(1)(b) therefore renders admissible only first-hand hearsay while s. 73A renders admissible second-hand hearsay as well.

[3a] According to s. 32(1)(b) of the Act, the statement of a person who is outside the jurisdiction of the court will fall under the classification of a person whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable. However, it will be dangerous to subscribe to the doctrine that mere residence out of the jurisdiction is adequate to dispense with the personal attendance of a witness and to allow his statement to be tendered in evidence. Sufficient evidence must be adduced to show that it will involve such delay and expense as may seem unreasonable to produce the maker as a witness. The question of

the reasonableness of the delay or expense should be considered with reference to the circumstances of each case. It is essentially a matter for the court to determine whether the attendance of a witness can be procured without any unnecessary delay or expense.

[3b] In this case, since Mr Thavarajah was outside the jurisdiction, the onus was on the plaintiffs to establish that his attendance could not be procured without an amount of delay or expense which under the circumstances of the case appeared to the court unreasonable. Based on the facts of the case, the plaintiffs had all the time to from 1991 to secure the witness's attendance and the issue of cost-effectiveness should not arise as the cost of bringing the witness from Australia bore no comparison to the amount involved in the claim. The plaintiffs therefore had failed to establish that Mr Thavarajah was beyond the seas and his attendance could not be procured without an amount of delay or expense which under the circumstances of the case appeared to the court unreasonable.

[3c] Furthermore, no such evidence was given to show that the documents were actually prepared by Mr Thavarajah. Since the signatures on the three notices of demand were totally different and bore no traces of similarity to one another, the conclusion was that the notices were not signed by the same person with the result that Mr Thavarajah could not be said to have been the maker of all the notices sought to be admitted in evidence.

[3d] It was also alleged that Mr Thavarajah had signed the notice of demand dated 2 August 1990. However, at the same time the plaintiffs were seeking to have this notice tendered in evidence on the ground that its alleged maker had migrated between 1988 and 1989. If Mr Thavarajah had migrated between 1988 and 1989, then he could not have issued the notice in 1990. In such circumstances it was ludicrous to suggest that the author of such notice was Mr Thavarajah.

[3e] In any event, as the notices were prepared based on information supplied by another person, Mr Thavarajah could not be said to have had personal knowledge of them with the result that s. 32(1)(b) of the Act was inapplicable.

[4a] There are certain conditions to be satisfied under s. 73A(1) of the Act, namely, that: (A) the statement must have been in a document; (B) the original document must be produced; (C)(i) the document in question is or forms part of a record purporting to be a continuous record; (ii)

the maker must have made the statement in the performance of a duty; (iii) the information must have been supplied to the maker by another person; (iv) the supplier of the information must have had or might reasonably be supposed to have had personal knowledge of the matter; (D) the statement must not have been made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish; and (E) the maker of the statement must be dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[4b] As to condition (A), the contents of the notices and the AR cards sought to be admitted in evidence in this case were statements of facts in documents as they related to a debt due contained in notices and the delivery of letters by way of AR cards respectively.

[4c] As to condition (B), although the AR cards were original, the letters written by the legal form were carbon copies produced from a typewriter. According to s. 62 of the Act, carbon copies produced by typewriters constitute primary evidence, being documents made by one and the same uniform process as the top copy. However in this case, no evidence was adduced to show that the top copies were signed with the use of a carbon so as to render the copies sought to be tendered in evidence to be treated as originals. In fact, the documents sought to be admitted showed that the signatures were affixed after the top copies had been signed on them separately. Thus, they did not qualify as originals. The plaintiffs had also not established the ingredients to be satisfied for a copy of such a document to be tendered.

[4d] As to condition (C)(i), the phrase "continuous record" relates to entries made progressively, and reasonably contemporaneous to the matters which they record, in a single document or series of documents comprising part of a system for the recording of information. In this case the documents in question were copies of notices and original AR cards form a file maintained in a solicitor's firm. The notices were kept in a file and the documents from the file showed that they were based on instructions from the client. The materials contained in them were original and gave effect to a transaction for the recovery of a loan. There was continuity in the documents and they had been made progressively. The documents were therefore a "continuous record". The AR cards however were not.

[4e] As to condition (C)(ii), it was a solicitor who recorded the information from his client. Since he was duty bound to act on information both to his client and to his firm, his act of recording the information and taking action on them was in the performance of a duty.

[4f] As to condition (C)(iii), there was no direct evidence to show that the information was supplied to Mr Thavarajah by the plaintiffs' Melaka branch. It was therefore not reasonable to infer that the information was supplied to him according to s. 73A(1) of the Act. This condition was therefore not fulfilled.

[4g] As to condition (C)(iv), s. 73A(1)(a)(ii) of the Act is confined in its operation to the actual supplier of the information and not anybody else. In this case PW2 stated that he had personal knowledge of the matter. This was however irrelevant as PW2 was not the supplier of the information. In fact it was the plaintiffs' Melaka branch which was the supplier of the information. This condition was therefore not fulfilled.

[4h] In relation to (D), the notices were supposedly prepared by a solicitor. As a solicitor is an officer of the court and his role when representing a client is to ensure that justice is done irrespective of whether the outcome of the proceedings is in favour of his client or not, the notices were not prepared by a person interested within the meaning of s. 73A(3) of the Act.

[4i] As to condition (E), where it is claimed that a witness is beyond the seas it must also be established that it is not reasonably practicable to secure his attendance. In this case the plaintiffs had not established that Mr Thavarajah was not available.

[4j] The plaintiffs therefore had only successfully proven that the statements were made in a document; that the AR cards were originals; that the notices formed part of a record purporting to be a continuous record; that the notices and the AR cards were made in the performance of a duty; and that the statements in the notices and the AR cards were not those made by a person interested. The other ingredients of s. 73A of the Act had not been proved. The documents were inadmissible pursuant to this section also.

[5a] There is a marked distinction between personal service and substituted service by post. In the case of the former there must be actual personal service on the defaulter while in the case of the latter proof of posting of the notice will suffice. In the absence of any agreement to the contrary between the parties in this case there must be personal service

of the notices of demand on the defendant. The evidence adduced showed that the mode of service attempted by the plaintiffs was through post.

[5b] Where the agreed mode of service is by post, then proof that the envelope containing the notice was posted will suffice to preclude the debtor from raising the defence that no demand was actually received by him. In this case there was no evidence of any agreement between the parties with regard to the mode of service of the notice of demand. This meant that the notices of demand should be served personally on the defendant in the absence of any agreement to the contrary.

[5c] On the issue of service of the notice of demand, no evidence was adduced by the plaintiffs to establish that the notices of demand were served on the defendant. In order to prove service of the notices of demand and the AR card, it must have been properly admitted in evidence. This was not done by the plaintiffs. In the absence of any evidence to show that the AR card had been returned duly acknowledged to constitute effective service of the notice of demand on the defendant, it would have been sufficient for the plaintiffs to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. In this case, no such evidence was adduced by the plaintiffs. Therefore, there could be no presumption that the notices of demand were received by the defendant.

[Claim dismissed.]

Cases referred to:

Abdul Ghani v. R AIR [1943] Cal 465 ***(refd)***
Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(foll)***
Annavi Muthiriyan v. Emperor [1915] 16 Cr LJ 294 ***(refd)***
Atra v. Farmers & Graziers Co-op Co Ltd [1986] 5 NSWLR 281 ***(foll)***
Barindra v. R 14 CWN 1114 ***(cit)***
Berjak (Victoria) Pty Ltd v. Peerless Processing Co Pty Ltd [1963] VLR 515 ***(foll)***
Bearmans Ltd v. Metropolitan Police District Receiver [1961] 1 All ER 304 ***(refd)***
Bian Chiang Bank Bhd v. Kwong Hing Cheong [1978] 2 MLJ 193 ***(refd)***
Borneo Co (M) Sdn Bhd v. Penang Port Commision [1975] 2 MLJ 204 ***(refd)***
Bowskill v. Dawson & Anor [1953] 2 All ER 1393 ***(refd)***
Bradford Old Bank v. Sutcliffe [1918] 2 KB 833 ***(refd)***
Brain v. Preece [1843] II M & W 773 ***(refd)***
Canadian Imperial Bank of Commerce v. Haley [1979] 100 DLR (3d) 470 ***(foll)***
Cartwright v. Richardson (w) & Co Ltd [1955] 1 All ER 742 ***(refd)***
Compafina Bank v. Australia & New Zealand Banking Group Ltd [1982] 1 NSWLR 409 ***(refd)***

Cullis v. Hamersley Iron Pty [1970] WAR 170 ***(refd)***
DA Dunstan v. Public Prosecutor [1980] 2 MLJ 195 ***(refd)***
Downs Irrigation Co-op Association Ltd v. National Bank of Australasia (No 2) [1983] 1 Qd R 475 ***(cit)***
Edmonds v. Edmonds [1947] P 67 ***(refd)***
Emperor v. A Bandulchi [1944] 45 Cr LJ 71
Evon v. Noble [1949] 1 KB 222 ***(refd)***
H v. Schering Chemical Ltd [1983] 1 All ER 849 ***(refd)***
Hill v. Baxter [1958] 1 QB 271
Hilton v. Lancashire Dynamo Nevelin Ltd [1964] 2 All ER 769 ***(refd)***
In the Estate of Pocoe [1956] P 110 ***(refd)***
Jati Mali v. Emperor [1929] 31 Cr LJ 857 ***(refd)***
Kadapa v. Thirupathi AIR [1925] M 444
Kantros v. Symons [1978] 34 ALR 342 ***(cit)***
Knight (deceased) & Ors v. David (deceased) & Ors [1971] 3 All ER 1066 ***(refd)***
Kok Kee Kwong v. PP [1972] 1 MLJ 124
Lenehan v. Queensland Trustees Ltd [1965] Qd R 559 ***(refd)***
Maroti v. Mahadeo A [1947] N 106 ***(refd)***
Mericka v. Mericka [1954] SASR 74 ***(refd)***
Mohamed Ghouse v. R [1910] 11 SSLR 31 ***(refd)***
Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 ***(refd)***
Myers v. DPP [1965] AC 1001 ***(foll)***
Ng Yin Kwok & Ors v. Public Prosecutor [1989] 3 MLJ 166 ***(refd)***
O' Leary v. Lamb [1973] 7 SASR 159 ***(refd)***
Ooi Thean Chuan v. Banqua Nationale de Paris [1992] 2 CLJ 1225 ***(refd)***
Parr's Banking Co Ltd v. Yates [1898] 2 QB 460 ***(refd)***
Piermay Shipping Co v. Chester [1978] 1 WLR 411 ***(refd)***
Public Prosecutor v. Datuk Hj Harun Hj Idris & Ors [1977] 1 MLJ 180 ***(refd)***
Public Prosecutor v. Leong Heo Cheong [1990] 2 CLJ 818 ***(refd)***
Public Prosecutor v. Paneerselvan & Ors [1990] 2 CLJ 833 ***(refd)***
Public Prosecutor v. Rengasamy [1974] 1 MLJ 223 ***(foll)***
Queen v. Oorloff [1900] 1 Browne R 328 ***(refd)***
R v. Case [1991] Crim LR 192 ***(refd)***
R v. Gillespie [1967] 51 Cr App R 172 ***(foll)***
R v. Governor of Pentonville Prison, ex p Osman [1988] 90 Cr App R 281 ***(refd)***
R v. Moghal [1977] Crim LR 373
R v. Plumer [1814] R & R 264
R v. Rice [1963] 1 QB 857 ***(not foll)***
R v. Romeo [1982] 30 SASR 243 ***(foll)***
R v. Tirada [1974] 59 Cr App R 80 ***(refd)***
Rasool v. West Midlands Passenger Transport Executive [1974] 3 All ER 638 ***(refd)***
Re Brown's Estate [1893] 2 Ch 300 ***(refd)***
Re Gardner [1968] 13 FLR 345 ***(foll)***
Re Koscot Interplanetary (UK) Ltd [1972] 3 All ER 829 ***(foll)***
Re Marra Developments Ltd and Companies Act (No2) [1979] 2 NSWLR 193 ***(refd)***

Ritz Hotel Ltd v. Charles of the Ritz Ltd (Nos 15 & 16) [1988] 14 NSWLR 107 ***(refd)***
Ross Mc Connel Kitchen & Co Pty Ltd v. Ross (No 1) [1985] 1 NSWLR 233 ***(foll)***
Savings and Investment Bank Ltd v. Gasco Invesments (Netherlands) BV [1984] 1 All ER 296 ***(refd)***
Sicklemore v. Thistleton [1817] 6 M & 59 ***(refd)***
Sim Tiew Bee v. A Bandulchi [1944] 45 Cr LJ 71 ***(foll)***
Sim Tiew Bee v. PP [1973] 2 MLJ 200 ***(foll)***
Subramaniam v. PP [1956] MLJ 200 ***(foll)***
T Sivasankaram Pillai v. Agali Narayama Rao AIR [1937] Mad 807 ***(refd)***
Tausz v. Elton [1974] 2 NSWLR 163 ***(refd)***
The Queen v. Oorloff [1900] 1 Browne R 328
Thrasyvoulos loannou v. Papa Christofors Demetrious [1952] 1 All ER 179 ***(foll)***
Tobias v. Allen (No 2) [1957] VR 221 ***(refd)***
Trade Practices Commissions v. TNT Management Pty Ltd [1984] ATPR 45 ***(refd)***
Tsia Development Enterprise Sdn Bhd v. Awang Dewa [1984] 1 MLJ 301 ***(refd)***
Watkins Products Inc v. Thomas [1965] 54 DLR (2d) 252 ***(refd)***
Wee Kee Puan v. Oversea-Chinese Banking Corp Ltd [1982] 1 MLJ 65 ***(refd)***
Wentworth v. Rogers (No 10) [1987] 8 NSWLR 398 ***(foll)***

Legislation referred to:
Civil Evidence Act 1968 [UK], ss. 2(2), 4(1)
Evidence Act 1950, ss. 32(1)(b), 62, 73A

Other sources referred to:
English Law Reform Committee, 15th report, para 32
Law of Banking, Poh Chu Chai, 3rd edn, vol II, pp 352-353
Law of Evidence, Monir, 10th edn, p 637
The Law of Evidence, ERSR Coomaraswamy, vol 1, p 462
The Supreme Court Practice 1985, vol 1, p 996
Phipson on Evidence, 8th edn, p 262
Sarkar on Evidence, 14th edn, vol 1, p 595

For the plaintiff - M Puravalen; M/s Kumar, Jaspal, Quah & Aishah
Defendant in person

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul JC:

This case which commenced as a claim for money advanced by the plaintiffs to the defendant on an overdraft account climaxed in a deliberation of the admissibility of certain documents under s. 32(1)(b) and s. 73A of the Evidence Act 1950 and the mode of service of a notice of demand in the course of the trial. Both the sections shall hereafter be referred to as "Section 32(1)(b)" and "Section 73A" and the Evidence Act 1950 as "the Act".

The plaintiffs by their writ dated 9 January 1991 instituted proceedings against the defendant for the recovery of a sum of $1,192,484.83 as of 30 November 1990. In substance the case for the plaintiffs is that they had granted a loan to the defendant by way of an overdraft account in the sum of RM500,000. The terms and conditions governing the loan are contained in the Letter of Offer dated 20 March 1984 the material parts of which read as follows:

Re: Application for a secured loan of $500,000.00 on overdraft basis

We are pleased to inform you that your application for a secured loan of $500,000.00 on overdraft basis has been approved subject to the following terms and conditions and those to be incorporated in a formal agreement to be drawn up by our solicitors and our discretion to alter, amend, add or withdraw without notice.

1. Amount approved:	$500,000.00.
2. Interest:	Adjustable, presently 14.5% per annum on monthly rest.
3. Terms:	1 year.
4. Maturity:	1 year from the date of first drawdown.
5. Processing fee:	$6,500.00.
6. Service fee:	$50.00 per annum.
7. Compulsory savings:	$100.00 per month withdrawal one year after full settlement of all outstandings.
8. Repayment:	On Demand. You are to deposit at least $6,500.00 per month into the account to keep interest current and account active.
9. Security:	Against registered 1st legal charge on properties held under the following Title Nos: a) GFS 17064, Lot No. 280, Town Area XVIII Central District, Malacca. b) SG 16099, Pt Lot No. 190, Mukim of Bukit Baru, Central District, Malacca. c) HS(D) 5079, Plot No. 9, Town Area XX, Central District, Malacca.

10.	Insurance:	All buildings are to be adequately insured against fire risk with mortgagee clause in the Bank's favour.
11.	Legal and Incidental expenses:	All legal charges and expenses including the Bank's solicitor-client cost are to be borne by you.
12.	Rent, rates and other charges:	Quit rent, assessment and all other charges due to the respective authorities are to be promptly paid by you with copies of receipts forwarded to the Bank.
13.	Predisbursement conditions:	1. You are to contribute a minimum of $500.00 towards share capital. 2. Building Contracts on subject site executed between the contractor and you is to be evidenced. 3. Approval for the building plan from the authority is to be submitted.
14.	Disbursement conditions:	The loan shall be disbursed in the following manner:- 1. Upon completion of legal documentation and subject to solicitors' confirmation that the properties are free from encumbrances. 2. To be made progressively against contractor's bills and subject to an inspection by the Bank Officer.
15.	Availability & Drawdown period:	The first drawdown for the facility shall be made within 3 months from the date of acceptance of this offer.
16.	Capitalisation of Interest:	The interest charged is to be serviced monthly. Any non payment of the interest as stipulated shall cause it to be capitalised and added to the principal sum with interest chargeable thereon at the same rate as prescribed above.

17. Default charges:	At any one time, the loan outstanding shall not exceed the approved limit. Any excess amount shall be subjected to the default charges at 1⅓ times and above interest rate and shall take effect from the date prescribed on the notice.
18. Other terms and conditions:	The registered land owner of properties Nos SG 16099, Pt Lot No. 190, Mukim of Bukit Baru, Central District, Malacca and Title No. HS(D)5079, Plot No. 9, Town Area XX, Central District, Malacca is to provide consent to Charge the subject properties to the Bank.

Should you have any queries or require any clarification on the above terms and conditions, please feel free to give us a call.

Please signify your acceptance of our offer on the above terms and conditions by signing and returning the duplicate copy of this letter together with a sum of $6,500 being processing and service fees within 30 days from date of this letter, failing which the offer will be treated as cancelled.

The gist of the plaintiffs' claim is contained in paras. 6 and 7 of the statement of claim which read as follows:

6. Tuntutan Plaintiff keatas Defendan pada 30.11.90 ialah untuk jumlah sebanyak $1,192,484.83 dan kadar faedah sebanyak 13% setahun dengan kiraan bulanan dari 1hb Disember 1990 sehingga tarikh penyelesaian.

7. Walaupun pihak Plaintiff telah menghantar Notis Tuntutan kepada Defendan, akan tetapi pihak Defendan telah gagal membayar jumlah tuntutan yang dihutang kepada pihak Plaintiff.

The defendant does not dispute the overdraft facilities extended to him but contends that no demand was made with regard to the claim made against him. This is reflected in para. 7 of the statement of defence which reads as follows:

Defendan menafikan bahawa plaintif telah menghantar notis tuntutan kepada defendan sebagaimana dikatakan dalam perenggan 7 penyataan tuntutan itu apa-apa notis.

It will therefore be noticed that the main plank of the defendant's case is that the notice of demand has not been sent to him while the plaintiffs contend that it has been done so. Where a claim can be made only on demand liability arises only when such a demand has been made and thus the service of a notice of demand is a pre-requisite for the institution of any proceedings in respect of the claim. This can be seen in guarantee cases where there is such a condition (see *Re Brown's Estate* [1893] 2 Ch 300; *Sicklemore v. Thistleton* [1817] 6 M & 59; *Bradford Old Bank v. Sutcliffe* [1918] 2 KB 833; *Mok Hin Wah & Ors v. United Malayan Banking Corporation Bhd* [1987] 2 MLJ 610). Similarly in the case of a debt due on an overdraft account a demand for repayment is necessary where there is a term in the overdraft agreement requiring such notice (see *Wee Kee Puan v. Oversea-Chinese Banking Corporation Ltd* [1982] 1 MLJ 65; *Parr's Banking Co Ltd v. Yates* [1898] 2 QB 460; *Bian Chiang Bank Bhd v. Kwong Hing Cheong* [1978] 2 MLJ 193). In this case there is an agreement between the parties for repayment upon demand as stipulated in the Letter of Offer. Thus service of a notice of demand on the defendant is necessary to render him liable to the plaintiffs.

The plaintiffs made an attempt to prove service of several notices of demand on the defendant allegedly by way of AR registered post initially through the evidence of one Hishamuddin bin Abdul Manap (PW1), advocate and solicitor, attached to the law firm of Messrs Nordin Hamid & Co who then acted for them and one Selvathesan a/l Jagasothy (PW2), their manager.

PW1 said that he has no personal knowledge of the plaintiffs having been clients of his firm and whatever knowledge he has is only through records from his office which show that the plaintiffs were their clients. The file of the plaintiffs bears the reference number of NH/CCB/35/85/KT(CFL)(VAL). He said that his firm had issued a letter of demand dated 6 August 1985 for the sum of $549,115.52 addressed to Mr Yau Jiok Hua of 6A Jalan Munshi Abdullah, Melaka. According to their record it was sent by AR registered post. He then produced a copy of the letter of demand and the AR card to show that the letter had been received. Learned counsel for the plaintiffs applied for these two documents to be marked as exhibits. The defendant objected to their admissibility on the ground that the witness tendering them was not the maker of the documents. Learned counsel for the plaintiffs then applied for the two documents to be marked for identification purposes only pending further evidence to be adduced to have them formally produced. The copy of the letter of demand and the AR card were accordingly marked as ID6 and ID7 respectively. Similarly a notice of demand dated 21 November 1986 for the sum of $625,079.88 and the AR card in respect of it were marked as ID17 and ID18 respectively; the copy of another notice of demand for the sum of $1,136,859.28 dated 2 August 1990 and the AR card in respect of it were

marked as ID15 and ID16 respectively. Also marked were a Form 16E issued under the National Land Code (ID9), the covering letter enclosing the form (ID8) and the AR card in respect of it (ID10); a letter informing the defendant that he had paid RM13,000 (ID11) and the AR card in respect of it (ID12); and two more documents (ID13 and ID14).

The plaintiffs' next witness, PW2, has been with the Co-operative Central Bank since 1980. He became a manager of the plaintiffs when Phileo Allied took over the assets and liabilities of the Co-operative Central Bank. He has personal knowledge of the subject matter of this case. He has had conduct of the defendant's account since he took the loan in 1984. The accounts of the defendant are now computerised. Two sets of the defendant's accounts were tendered and marked by consent as P19 and P20. According to P19 the amount owed by the defendant is RM2,712,524.70. This is inclusive of default interest. Without the default interest the amount outstanding is RM2,310,560.95 as stated in P20. When he was referred to ID6 to ID18 he said that with regard to this claim the Melaka Branch of his bank gave instructions to Messrs Nordin Hamid & Co. He said that the documents referred to him were issued on his behalf by Messrs Nordin Hamid & Co and that the solicitor who was handling the matter for the plaintiffs was one Mr Thavarajah. He has spoken to Mr Thavarajah on the phone. To the best of his knowledge Mr Thavarajah is now in Australia. He obtained this information from one Mr Kenneth Gomes, a partner of Messrs Nordin Hamid & Co in Kuala Lumpur. Mr Kenneth Gomes had told him that Mr Thavarajah had left the firm sometime between 1988-1989 and that, to his knowledge, had migrated to Australia and was not sure of his present whereabouts. PW2 had also been informed by other panel lawyers of his bank that Mr Thavarajah is not practising in Malaysia now and is not in the country. PW2 said that he did consider looking for Mr Thavarajah in Australia but did not do so as, firstly, his exact whereabouts were not known and, secondly, it would not be cost effective to bring him down for the trial of this case. Furthermore he did not know how long it will take him to locate Mr Thavarajah in the event that he had to locate him. To a further question he confirmed that the contents of ID6 to ID18 are within his personal knowledge and that the authors of these documents are Messrs Nordin Hamid & Co. He referred to the signatures on the documents and said that to his knowledge they are the signatures of Messrs Nordin Hamid & Co. He confirmed that the documents were issued by the solicitors in consequence of his instructions. Learned counsel for the plaintiffs then applied for ID6 to ID18 to be marked as exhibits pursuant to s. 32(1)(b) and s. 73A. He said that PW1 had confirmed that the documents were records from his office and that they were written on the instructions of PW2. He added that there is evidence to show that the maker is beyond the seas and his exact whereabouts in Australia

are not known and that unreasonable delay and expense would be incurred in attempting to procure the attendance of the witness. The defendant objected to the admissibility of the documents as it has not been established who the author of the documents was. Thus it cannot be said that the author of the documents was Mr Thavarajah. Furthermore, he said, no evidence was adduced to establish the efforts taken to locate the witness even if in fact he was the author.

The evidence adduced reveals that the method attempted by the plaintiffs to establish service of the notices of demand on the defendant was by post. They sought to prove such service through the production of copies of the notices and the AR cards relating to them. Whether this is the right mode of service, on the facts of this case, is a matter of considerable significance which I shall address at the end of this judgment. For the moment I shall confine myself to a consideration of whether the notices of demand were properly served on the defendant even on the method of service adopted by the plaintiffs.

It is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it the maker has to be called (see *R v. Gillespie* [1967] 51 Cr App R 172; *R v. Plumer* [1814] R & R 264; *Hill v. Baxter* [1958] 1 QB 271; *R v. Moghal* [1977] Crim LR 373). Non-compliance with this rule will result in the contents of the documents being hearsay. The evidential effect of a document which has not been properly proved was described by Abdoolcader J (as he then was) in *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p. 183 in the following terse terms:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot form part of the record in this case, namely, D 41 and D 43 which were both put in for identification only and which are the audited accounts and annual report of the bank for the years 1973 – 74 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto.

In the premises the evidence of Mr. Thavarajah is critical for the plaintiffs not only to establish that the notices of demand were prepared by him but also that they were served on the defendant. As he is not available to give evidence on these matters the plaintiffs sought to render such evidence admissible through s. 32(1)(b) and s. 73A by not calling him as a witness.

Both the sections are statutory exceptions to the general rule that hearsay evidence is not admissible. However, there is an important distinction between s. 32(1)(b) and s. 73A. It is my view that in the case of the former the maker of the statement must have had personal knowledge of its contents. That is the position under English common law (see *Brain v. Preece* [1843] II M & W 773). But at least one Indian case seems to suggest that personal knowledge of the maker of the statement is not a requirement under s. 32(1)(b). In this regard I refer to *Sarkar on Evidence* 14th Ed Vol 1 p. 595:

> Under the English rule, the maker of the entry should have also personal knowledge of the statements contained therein (Tay s700). The rule is strictly adhered to. There is no similar restriction as to personal knowledge in the Act, which simply requires that entries in accounts should, in order to be relevant, be regularly kept in the ordinary course of business; and although it may no doubt be important to show that the person making or dictating the entries had, or had not personal knowledge of the facts stated, this is a question which according to the rule here affects the value and not the admissibility of the entries (see *R v. Hanumanta,* 1 B 610, 616). The contrary opinion in *Maroti v. Mahadeo,* A I947 N 106 that personal knowledge is required cannot be regarded as good law as nowhere does cl. (2) say so, nor was attention drawn to *Hanumanta's* case.

With respect, I am unable to agree with the above passage. It is trite law that a statement which is not based on personal knowledge would amount to hearsay and be inadmissible. Hearsay becomes admissible only when specific provision has been made for its admissibility. In the case of s. 32(1)(b) a statement becomes admissible only on the ground of the non-availability of its maker. Thus the statement must be such that it would be admissible if the maker himself had given evidence. It follows that the statement must, in the first place, be admissible. The result is that evidence which is inadmissible, for example hearsay, would not come within the ambit of the section. If hearsay is not admissible when the person to whom it is made is called as a witness I do not see how it can become admissible when he is not available to give evidence as in the instances provided by s. 32(1)(b) without any special qualification having been provided to that effect. I would therefore say that the Indian case of *Maroti v. Mahadeo* A 1947 N 106 was rightly decided. In that case Niyogi and Boss JJ said at p. 108:

> It is contended that the account books were sufficient by themselves to charge the defendants with liability because the persons who made the entries were dead and that it was not necessary to prove that they had personal knowledge of the transaction entered by them. We find it difficult to accept this contention in view of the clear wording of s. 32(2), Evidence Act. Under the English law it is necessary that the entries or declarations must have been made by one

who had personal knowledge of the facts: see *Sarkar on Evidence,* Edn 6 p. 307. The learned author is of opinion that the restrictions imposed by the English law on the admission of such entries are not contemplated by cl. (2) of s. 32. The learned author has not cited any authority to fortify his opinion nor has any Indian case been brought to our notice in support of it.

Accordingly, it is my view that s. 32(1)(b) is confined in its operation to a statement which is based on the personal knowledge of its maker. On the other hand the language of s. 73A makes express provision for the admissibility of a statement even when its maker did not have personal knowledge of its contents though the supplier of the information to the maker must have had such knowledge. That is the major difference between s. 32(1)(b) and s. 73A. The corollary is that s. 32(1)(b) renders admissible only first-hand hearsay while s. 73A renders admissible second-hand hearsay also.

I shall now consider the requirements of the two sections in order to determine whether the plaintiffs can rely on them.

Section 32(1)(b)

The section reads as follows:

> 32(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books, kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated written or signed by him.

Under s. 32 the hearsay evidence that is admissible relates to ten categories of relevant facts, of which sub-s. (b) is one, made by four categories of persons. The categories of persons whose statements are relevant facts are those made by:

(a) a person who is dead; or

(b) who cannot be found; or

(c) who has become incapable of giving evidence; or

(d) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable.

Section 32 which creates a considerable alteration to the law of evidence, should, so far at least as its opening portion is concerned, be construed strictly which means that there must be strict proof to explain the non-availability of the maker as a witness (see *Mohamed Ghouse v. R* [1910] 11 SSLR 31). Then the circumstances that would bring a statement within any of the provisions enumerated in the section must be established (see *PP v. Leong Heo Cheong* [1990] 2 CLJ 818; *DA Dunstan v. PP* [1980] 2 MLJ 195; *Sim Tiew Bee v. PP* [1973] 2 MLJ 200). The burden of proving such circumstances is on the party desiring to lead the evidence (see *The Queen v. Oorloff* [1900] 1 Browne R 328; *Emperor v. A Bandulchi* [1944] 45 Cr LJ 71; *Abdul Ghani v. R* AIR [1943] Cal 465).

The statement of a person who is outside the jurisdiction of the court would fall under the classification of a person whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable (see *Ng Yin Kwok and Ors v. PP* [1989] 3 MLJ 166). However, it would be dangerous to subscribe to the doctrine that mere residence out of the jurisdiction is adequate to dispense with the personal attendance of a witness and to allow his statement to be tendered in evidence (see *Mohamed Ghouse v. R* [1910] 11 SSLR 31; *Kadappa v. Thirupathi* AIR [1925] M 444). Sufficient evidence must be adduced to show that it would involve such delay and expense as would seem unreasonable to produce the maker as a witness (see *Sim Tiew Bee v. PP* [1973] 2 MLJ 200). The question of the reasonableness of the amount of delay or expense should be considered with reference to the circumstances of each case. It is essentially a matter for the court to determine whether the attendance of a witness cannot be procured without any unnecessary amount of delay and expense (see *Jati Mali v. Emperor* [1929] 31 Cr LJ 857; *Annavi Muthiriyan v. Emperor* [1915] 16 Cr LJ 294). In *R v. Case* [1991] Crim LR 192 where on a trial for theft from a tourist, the judge admitted in evidence the out of court statements made by the tourist and his companion, it was held that the judge had wrongly admitted the statements since there was no evidence to show that they were outside England or that it was not practicable to call them except at high expense and delay. In *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 2

MLJ 204 it was held that it would be unreasonable to expect a witness to be brought from England to give merely formal evidence when the expenses of bringing him down would exceed the subject matter of the claim. As ERSR Coomaraswamy said in his book entitled *The Law of Evidence* Vol 1 at p. 462:

> On the other hand, if the matter involves a very large sum of money, such as a few millions of rupees, the court may not consider it an unnecessary amount of delay and expense to procure the personal attendance of a material witness, who is absent beyond the seas.

As Mr Thavarajah is outside the jurisdiction of this court the plaintiffs may rely on s. 32(1)(b) to tender in evidence the notices, if prepared by him, as they were made in the discharge of his professional duties subject to proof of the required conditions. As I said earlier the onus is on them to establish that his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable. The first observation to be made is that Mr Thavarajah is a very material witness as the plaintiffs' claim depends on his evidence to prove service of the notices of demand allegedly issued by him the receipt of which has been denied by the defendant in para. 6 of the defence. The plaintiffs ought to have been aware of the importance of this witness way back in 1991 when the statement of claim and the defence were filed. It is illogical to come to court in 1997 and say that there would be delay in producing this witness in court when the plaintiffs had all the time from 1991 to secure his attendance. If the plaintiffs had made efforts to trace him earlier then the question of delay would not arise. PW2's evidence that it would not be cost effective to bring the witness to court for the hearing is unacceptable bearing in mind the size of the subject matter of the claim. In my opinion the cost of bringing the witness from Australia bears no comparison to the amount involved in the claim. In any event PW2's evidence on the witness being beyond the seas is hearsay and is therefore inadmissible. His evidence is based on what others, including one Mr Kenneth Gomes, had told him. Those persons ought to have been called to testify on the whereabouts of Mr Thavarajah which the plaintiffs had failed to do. PW2 also said that the plaintiffs were satisfied that all reasonable steps had been taken to locate Mr Thavarajah without condescending to give any particulars. In being so satisfied the plaintiffs had taken over the role of the court which alone is empowered to decide on this issue upon cogent evidence being adduced. The plaintiffs have therefore failed to establish that Mr Thavarajah is beyond the seas and that his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable.

It is superfluous to state that a party seeking to activate s. 32(1)(b) must establish that the statement sought to be tendered in evidence was in fact made by the person who is not available. Execution of a document may be proved by various methods. One method that the plaintiffs could have adopted to prove the documents was by proof that the signatures on the documents were that of Mr Thavarajah. No such evidence was given by PW1 and PW2. Neither did they give any other evidence to show that the documents were prepared by Mr Thavarajah. I consider it necessary to determine whether the documents were prepared by Mr Thavarajah by comparing the signatures on the various documents alleged to have been made by him. The signatures appearing on ID6, ID13, ID15 and ID17 are as shown below by way of scanned reproduction from the documents.

It is obvious to even the most uninitiated that the signatures on the three notices of demand, that is to say, ID6, ID15 and ID17 are totally different and bear no trace of similarity to each other. I do not discount the fact that a person may have different signatures. If that is so then evidence ought to have been led on that fact which was not done. Thus it is my view that the notices were not signed by the same person with the result that Mr Thavarajah cannot be said to have been the maker of all the notices sought to be admitted in evidence. Quite apart from the differences in the signatures appearing on the notices I found strong and convincing support for my conclusion from the notice of demand dated 2 August 1990 (ID15) allegedly signed by Mr Thavarajah. The plaintiffs are seeking to have this notice tendered in evidence on the ground that its alleged maker had migrated between 1988 and 1989. In such circumstances it is ludicrous to suggest that the author of ID15 is Mr Thavarajah. If he had migrated between 1988 and 1989 he could not have issued the notice in 1990. Surely it must have been issued by some other person from Messrs Nordin Hamid & Co. The differences in the signatures in ID15 and the other notices can now be seen to be self-explanatory. The plaintiff had therefore led no evidence to show that the notices were prepared by Mr Thavarajah. In any event, as the notices were prepared based on information supplied by another person, Mr Thavarajah cannot be said to have had personal knowledge of them with the result that s. 32(1)(b) is inapplicable. With regard to the AR cards no attempt was made by the plaintiffs to lead any evidence to render them admissible under the section.

In the premises it was my view that the plaintiffs had failed to bring themselves within the ambit of s. 32(1)(b) to enable them to tender the documents in question as evidence under the subsection.

Section 73A

The section reads as follows:

(1) Notwithstanding anything contained in this chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:

(a) if the maker of the statement either:

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-s. (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document, or the material part thereof, was written, made or produced by him with his own hand, or was signed or initialled by him, or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of sub-ss. (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(7) For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

This section is modelled on the Evidence Act 1938 of England which has been modified by the Civil Evidence Act 1968. The 1938 Act has been followed in the Australian jurisdictions. Thus English and Australian cases on their similar provisions would be of assistance in interpreting the section. Primarily, the section provides for the admissibility of a statement made in a document when the maker is called as a witness subject to satisfaction of the conditions enumerated therein. The section then goes on to provide for the admissibility of the statement when the maker is not called as a witness. In this regard the section creates a statutory exception to the rule against hearsay in two classes

of case. The first is where the maker of the statement has personal knowledge of the matters dealt with by the statement and is not called as a witness. The second is where the maker of the statement lacks personal knowledge of the facts stated therein because he made the statement which he produces in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters. Before I proceed any further I would like to make a preliminary observation on the effect of s. 73A(1). Pursuant to this subsection a statement made by a person in a document is admissible in evidence if the maker of the statement is called as a witness in the proceedings. This will render admissible a prior consistent statement of a witness. Thus a party could call a witness, ask him to verify his statement and put it in as of right, thus avoiding any examination-in-chief. In *Hilton v. Lancashire Dynamo Nevelin Ltd* [1964] 2 All ER 769 the court felt obliged to admit the statement of one of the defendant's witnesses at the outset of his examination-in-chief. This effect caused the English Law Reform Committee in its 15th Report to say this at para 32:

> Examination-in-chief by question and answer without leading questions on matters in dispute plays an important part in our system of eliciting the truth under the adversary system. As every judge and advocate knows, witnesses often fail to 'come up to their proof' in examination-in-chief and this is one of the commonest ways in which truth will be out.

Accordingly, s. 2(2) of the Civil Evidence Act 1968 has nullified this effect by providing that:

> Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement:
>
> (a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and
>
> (b) without prejudice to para. (a) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person by whom it was made.

Be that as it may, it must not be overlooked that verification of a prior statement by a witness without having to give formal evidence on it will ensure that cases are disposed of more speedily. The fact that the witness will be subjected to cross-examination on his prior statement will suffice to ensure that this provision does not affect the smooth operation of the adversarial system. In my opinion the English amendment whereby the statement is tendered at the end of the examination-in-chief of the witness will not serve

any useful purpose apart from showing consistency. It must be remembered that nothing in the section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish. This qualification will ensure that the statement serves the ends of justice.

There are certain conditions that must be satisfied before a statement can be admitted in evidence under s. 73A. I shall confine myself, on the facts of this case, to the position where the maker of the statement does not have personal knowledge of the contents of the statement within the meaning of s. 73A(1)(a)(ii) and is not available to give evidence as provided by the proviso to s. 73A(1)(b). The conditions to be satisfied are:

(a) the statement must have been made in a document;

(b) the original document must be produced;

(c) the document in question is or forms part of a record purporting to be a continuous record (in so far as the matters dealt with thereby are not within his personal knowledge) and was made in the performance of a duty to record information supplied to the maker by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters;

(d) the statement must not have been made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish; and

(e) the maker of the statement must be dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

The language of s. 73A requires all the conditions enumerated above to be satisfied. I shall now consider the requirements of the conditions that I have highlighted against the background of the evidence adduced by the plaintiffs in support of each of them.

(a) The Statement Must Have Been Made In A Document

The meaning of the words "document" and "statement" require some consideration. Section 3 of the Act says that a "document"

> ... means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of:
>
> (a) letters, figures, marks, symbols, signals, signs or other forms of expression, description, or representation whatsoever;
>
> (b) any visual recording (whether of still or moving images);
>
> (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;
>
> (d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in para. (a), (b) or (c), or by more than one of the means mentioned in paras. (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter.

The word "statement" which must be one of fact is not defined in the Act. However, in *PP v. Paneerselvan & Ors* [1991] 1 MLJ 106 Edgar Joseph Jr J (as he then was) pointed out that the word "statement" in s. 157 of the Act means "something that is stated" and the element of communication to another person is not included in it. To my mind this definition would apply to statements under s. 73A except those that come under s. 73A(1)(a)(ii) as it relates to the making of a statement by a person based on information supplied to him by another person. That would make the element of communication an integral part of the subsection. Furthermore, the word "statement" must be construed widely and is not limited to formal documents or those expressed in the first person (see *Cullis v. Hamersley Iron Pty* [1970] WAR 170). In *Lenehan v. Queensland Trustees Ltd* [1965] Qd R 559 it was held that it includes requests, tendered as evidence that a request was made, as for example the request "send the things along"; as well as statements of intention, tendered as evidence of the maker's intention at a particular time, as for example the statement "I will be sending the things along". A recommendation is not a statement of fact (see *O' Leary v. Lamb* [1973] 7 SASR 159). The plaintiffs must establish that the statements in the documents were made by an identifiable person.

There can be no dispute that the contents of the notices and the AR cards sought to be admitted in evidence in this case are statements of facts in documents as they relate to a debt due contained in notices and the delivery of letters by way of AR cards respectively. However, there is no direct evidence to show that the statements in the notices were made by Mr Thavarajah. This is for the reason, as I said in an earlier part of the judgment, that the signatures on the four documents (including the three notices of demand) are different and, in any event, ID15 was made at a time when its alleged maker had already migrated. Even PW2's evidence only goes so far as to say that the person in Messrs Nordin Hamid & Co who was handling the matter for them was Mr Thavarajah. He did not go on record to say that the notices concerned were prepared by Mr Thavarajah. Neither is it reasonable to make such an inference as provided by s. 73A(5) on the facts of this case as just described. Accordingly, the notices cannot be said to have been made by Mr Thavarajah because s. 73A(4) provides that a statement in a document shall not be deemed to have been made by a person unless the document, or the material part thereof, was written, made or produced by him with his own hand, or was signed or initialled by him, or otherwise, recognised by him in writing as one for the accuracy of which he is responsible. The same process of argument applies to the AR cards. No evidence was led by the plaintiffs on the authorship of the statements in the AR cards.

(b) The Original Document Must Be Produced

Section 73A(1) requires production of the original document. The documents sought to be tendered in evidence are copies of letters written by Messrs Nordin Hamid & Co and AR cards. The latter are originals while the position of the former requires deliberation as they are copies. The copies tendered are carbon copies produced from a typewriter. Their status is governed by s. 62 of the Act which reads as follows:

> Primary evidence means the document itself produced for the inspection of the court.
>
> **Explanation 1** – where a document is executed in several parts, each part is primary evidence of the document.
>
> Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
>
> **Explanation 2** – where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.

Explanation 3 – A document produced by a computer is primary evidence.

ILLUSTRATION

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

I agree, respectfully, with *PP v. Rengasamy* [1974] 1 MLJ 223, as opposed to the judgment in *Kok Kee Kwong v. PP* [1972] 1 MLJ 124, where it was held that carbon copies produced by typewriters constitute primary evidence as they fall under s. 62 Explanation 2 being documents made by one and the same uniform process as the top copy. In further support I refer to *Ooi Thean Chuan v. Banqua Nationale de Paris* [1992] 2 MLJ 526 where Edgar Joseph Jr J (as he then was) said at p. 538:

In practice, a number of petitions would be made by one uniform process by typewriter or word processor or computer; so that each would be primary evidence of the rest. (See Explanation 2 to s. 62 of the Evidence Act 1950 (Rev 1971).

The same principle is applicable where the top copy and the copies are signed. In order for a signed carbon copy to qualify as an original the signature must also have been produced in the same uniform process. In *T. Sivasankaram Pillai v. Agali Narayama Rao* AIR 1937 Mad 807 Venkataramana Rao J said:

The contention is that Ex. A and the letter sent to the Government were all made by one uniform process, namely by typing on a type machine, and as it contains the initials of the President, Ex. A itself is also the original. It seems to me that this contention proceeds on a misapprehension of the said Explanation. It is no doubt true that the contents of both the letters addressed to the Government and Ex. A were made by one uniform process, namely typing, but without the signature of the President they cannot constitute a letter and therefore a document within the meaning of the said Explanation. It is after the contents of the letter had been typed that the defendant signed the document which was addressed to the Government and then initialed Ex. A which was kept in the Taluk Board Office. Therefore the signature on the document addressed to the Government and the initials on Ex. A could not be said to have been made by one uniform process. The whole document with the signature must have been made by one uniform process within the meaning of the Explanation which is not the case here.

In *Ooi Thean Chuan v. Banqua Nationale de Paris* [1992] 2 MLJ 526 Edgar Joseph Jr J (as he then was) said at p. 538:

In practice, a number of petitions would be made by one uniform process by typewriter or word processor or computer, so that each would be primary evidence of the rest. (See Explanation 2 to s. 62 of the Evidence Act 1950 (Rev. 1971)).

It is often overlooked that there can be more than one original of a document. As far back as 1796, Eyre CJ held in *Gotlieb v. Danvers* [1796] 170 ER 418 that where two copies of the same document are made at the same time, both should be deemed originals. Signed carbon copies may also be deemed originals. In *Durston v. Mercuri* [1969] VR 507, Menhennitt J dealing with a carbon copy of a breath analysis certificate, commented:

> I am concerned with a document which is a carbon copy of the original and contains everything that was in the original including the signature. Thus it is in one sense an original. The same hand using the same pen produced at the same time the writing on both the original and the carbon copy. In the case of the original the writing was left by the ink from the pen; in the case of the carbon copy it was left by the carbon from the carbon paper. But the words written were both produced by the same writing. In these circumstances, I am disposed to think that a carbon copy of the document which is a completed copy in every respect including the signature is for all purposes equivalent to the original and admissible in evidence as prime evidence of the contents of the original.

Thus a carbon copy signed separately after the top copy had been signed is not something "... produced at the same time …" and "... is not a complete copy including the signature ..." as stated in the above case to qualify as an original (see also *Tsia Development Enterprise Sdn Bhd v. Awang Dewa* [1984] 1 MLJ 301). Of course, if it can be shown that the signatures on both the documents were made by one uniform process, that is to say, that the top copy only was signed with the use of a carbon paper then both the documents would be originals. In this case no evidence was adduced to show that the top copies were signed with the use of a carbon so as to render the copies sought to be tendered in evidence to be treated as originals. On the contrary a perusal of the documents sought to be admitted shows that the signatures were affixed after the top copies had been signed on them separately. Thus they do not qualify as originals under s. 73A(1).

However, s. 73A(2)(b) provides that where the original document is not produced a copy of the original document or of the material parts thereof certified to be a true copy in such manner as may be specified by the court or as the court may approve, as the case may be, may be admitted. In commenting on the requirements to be satisfied before a copy may be admitted Devlin J said in *Bowskill v. Dawson and Anor* [1953] 2 All ER 1393 at p. 1394.

> The condition which is required to be satisfied before a copy can be produced is that the court should, having regard to all the circumstances of the case, be satisfied that undue delay or expense would otherwise be caused. It is not, therefore, a provision designed as a substitute for the common law rule as to secondary evidence of lost documents. It requires the court to be satisfied that undue delay or expense, would otherwise be caused, and, therefore, implicitly requires that the original document be in existence, and the only question that arises is whether it would cause unnecessary delay or expense to have it produced. This is borne out by what follows in the rest of the section. The copy to be admitted must be certified to be a true copy. It looks as if the legislature had in mind the rule that where there are original documents which are kept in the custody of, for instance, a bank or a public authority, and it is inconvenient to have them brought to court, a certified copy is accepted instead.

The plaintiffs did not lead any evidence to establish the pre-conditions necessary to admit the copies in evidence. Thus the documents do not qualify as copies within the meaning of the subsection. I interpolate to add that s. 73A which has been enacted to have effect "notwithstanding anything contained in this chapter ..." precludes the applicability of ss. 65 and 66 of the Act, dealing with the admissibility of secondary evidence, which appear in the same chapter of the Act. The plaintiffs have therefore not established this ingredient as they have failed to tender the original documents. Neither did the documents tendered, which were copies, comply with the requirements of s. 73A(2)(b).

(c) The document in question is or forms part of a record purporting to be a continuous record (in so far as the matters dealt with thereby are not within his personal knowledge) and was made in the performance of a duty to record information supplied to the maker by a person who had, or might reasonably be supposed to have had, personal knowledge of the matter

This condition requires proof of four elements. They are:

(i) the document in question is or forms part of a record purporting to be a continuous record;

(ii) the maker must have made the statement in the performance of a duty;

(iii) the information must have been supplied to the maker by another person; and

(iv) the supplier of the information must have had, or might reasonably be supposed to have had, personal knowledge of the matter.

I shall consider the different elements separately.

(i) The Document In Question Is Or Forms Part Of A Record Purporting To Be A Continuous Record

The document in question must be or form part of a record purporting to be a continuous record. Bingham J considered the meaning of the word "record" in *H v. Schering Chemical Ltd* [1983] 1 All ER 849 in the context of the Evidence Act 1938 and the Criminal Justice Act 1965 of England and said that in order for something to qualify as a record it must be one which a historian would regard as original or primary, either giving effect to a transaction, or containing a contemporaneous register of information supplied by those with personal knowledge and that it does not extend so far as to deal with compilations made from those primary statements (see also *Ross Mc Connel Kitchen & Co Pty Ltd v. Ross (No 1)* [1985] 1 NSWLR 233). It was accordingly ruled that the research reports, articles and letters in medical journals in that case did not qualify as records. This approach was approved in *Savings and Investment Bank Ltd v. Gasco Investments (Netherlands) BV* [1984] 1 All ER 296 and by the Court of Appeal in *R v. Governor of Pentonville Prison, Ex parte Osman* [1988] 90 Cr App R 281. In Canada the same view was taken in *Watkins Products Inc v. Thomas* [1965] 54 DLR (2d) 252 where it was held that a "record" comprises some particular which is entered in the records of the business for the first time. In *R v. Tirado* [1974] 59 Cr App R 80 the court hesitated to say that a file of correspondence maintained simply as a file, and added to from time to time as letters come in, is a "record" within the meaning of s. 1(1) of the Criminal Evidence Act 1965 as it seems to contemplate the making or compilation of a record, such as cash book, ledger, or stock book, which contains information deliberately entered in order that it may be available to others another day. The meaning of the phrase "continuous record" was stated by Lord Tucker in *Thrasyvoulos loannou v. Papa Christofors Demetrious* [1952] 1 All ER 179 in the following terms at p. 184:

> Without attempting to give a definition of 'continuous record' it is sufficient to say that the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject-matter does not necessarily make the contents of the file a "continuous record" within the meaning of the section.

In *Berjak (Victoria) Pty Ltd v. Peerless Processing Co Pty Ltd* [1963] VLR 515 the Full Court of Victoria said at p. 519:

> The reason for requiring as a condition of its admissibility in evidence that a document containing information supplied by others should itself be a continuous record or part of a continuous record would seem to be the higher degree of probability that entries in a record of this nature, would be true. This would be so, at least, if 'continuity' imports in this context some dependence of subsequent entries in the record, upon those which have preceded them.
>
> Consistently with such a reason for the enactment, and giving to the words their ordinary and natural meaning, we would think that before a document could be admissible under this part of the enactment as being part of a continuous record there must at least be shown that some physical entity, such as a single document, or series of documents comprising a file of documents, is in existence and that it is appropriate to describe such physical entity as a continuous record.

In *Atra v. Farmers & Graziers Co-op Co Ltd* [1986] 5 NSWLR 281 it was held that the phrase "continuous record" relates to entries made progressively, and reasonably contemporaneously to the matters which they record, in a single document or series of documents comprising part of a system for the recording of information; it did not extend to historical documents written up years after the event, comprising a mixture of information derived from primary records and received orally by persons who may have had personal knowledge of those letters.

The documents sought to be admitted in evidence in this case are copies of notices and original AR cards from a file bearing reference number NH/CCB/35/85/KT (CFL)(VAL) maintained in a solicitor's firm. I shall first deal with the position of the notices. Copies of letters in a file sent to someone else are records (see *Compafina Bank v. Australia & New Zealand Banking Group Ltd* [1982] 1 NSWLR 409). The file containing copies of the notices is not a file of correspondence and added to from time to time as letters come in as in *R v. Tirada* [1974] 59 Cr App R 80. Thus the copies of the notices in the file would qualify as records. With regard to their classification as a continuous record a reading of the documents from the file now before the court show that they are based on instructions from the client. The materials contained in them are original and give effect to a transaction for the recovery of a loan. There is continuity in the documents and they have been made progressively. Just as in *Edmonds v. Edmonds* [1947] P 67 where notes of evidence made by a commissioner appointed by a court was held to be part of the continuous record of the proceedings of the court in question as it was its duty to take down such evidence so are instructions taken down in writing as they form a continuous record of a solicitor's duty to so act. It is therefore appropriate to describe the documents in the file as a continuous record. I must add that the

inferences that I have drawn in coming to this conclusion are reasonable based on the contents of the documents as authorised by Section 73A(5) (see *Re Marra Developments Ltd and Companies Act (No 2)* [1979] 2 NSWLR 193). With regard to the AR cards I refer to *Trade Practices Commission v. TNT Management Pty Ltd* [1984] ATPR 45, 531 where it was held that the original of a letter received from somebody else is not a record just because it is in the file. It follows that the AR cards are in a similar position as they are original documents received from the postal authorities. Thus the plaintiffs have established that the notices fall within this ingredient though not the AR cards.

(ii) The Maker Must Have Made The Statement In The Performance Of A Duty

In my opinion a solicitor who records information from his client does so in the performance of a duty. Since he is duty bound to act on the information both to his client and to his firm his act of recording the information and taking action on them is in the performance of a duty. As the notices of demand were prepared based on information supplied to the maker, a solicitor, they were made in the performance of a duty. The acknowledgment of receipt in the AR cards would qualify similarly as the recipient is under a duty to acknowledge receipt.

(iii) The Information Must Have Been Supplied To The maker By Another Person

In order to establish this element there must be evidence to show that the document was prepared by an identified person from information supplied to the maker by an identified person (see *Re Koscot Interplanetary (UK) Ltd* [1972] 3 All ER 829). In proof of this issue PW2 said in his evidence that as far as this claim is concerned the Melaka Branch of his bank gave instructions to Messrs Nordin Hamid & Co. He did not identify the particular person to whom the instructions were given. Therefore there is no direct evidence to show that the information was supplied to Mr Thavarajah by the plaintiff's Melaka Branch. It is not reasonable to infer that the information was supplied to him in accordance with s. 73A(5) in the light of my earlier finding on the uncertainty of the identity of the maker of the statement. There is also no such evidence in the case of the AR cards.

(iv) The Supplier Of The Information Must Have Had, Or Might Reasonably Be Supposed To Have Had, Personal Knowledge Of The Matter

The general principle underlying s. 73A is that a statement is inadmissible under the section unless it is in a form which would be "admissible if proffered orally in the witness box in person, by the maker of the written statement" (see *Tobias v. Allen (No 2)* [1957] VR 221). Thus the maker of the statement must have had personal knowledge of the fact. By the expression "personal knowledge" the section applies a criterion equivalent to that which under the common law principles of evidence separates matters perceived or experienced directly by the person concerned from matters of belief derived from hearsay (see *Ritz Hotel Ltd v. Charles of the Ritz Ltd (Nos 15 and 16)* [1988] 14 NSWLR 107). Accordingly, a statement such as "I know A and B are married because I read an account of the wedding in a newspaper" would be inadmissible (see *Mericka v. Mericka* [1954] SASR 74). However, under s. 73A(1)(a)(ii) the maker himself need not have personal knowledge. It is sufficient if the person who supplied the information to the maker must have had, or might reasonably be supposed to have had, personal knowledge of the matters. In such instances there is no requirement that the maker could give direct oral evidence; it is enough if any observer of the facts referred to in the statement could give direct oral evidence of them (see *Tausz v. Elton* [1974] 2 NSWLR 163). The party seeking to tender a document must establish that this requirement has been satisfied (see *Re Koscot Interplanetary (UK) Ltd* [1972] 3 All ER 829). Failure to establish this fact would render the document inadmissible. Thus, as Phipson on *Evidence* 8th Edn says at p. 262:

> Consequently if the informant upon whom the person making the record relies has not first-hand knowledge, the document is not made admissible by the Act.

It becomes inadmissible as the contents of the documents cannot be established by direct oral evidence as required by s. 73A(1).

With regard to the requirement of personal knowledge of the supplier of the information PW2 said that he has personal knowledge of the subject matter of this case. He had conduct of the defendant's account from the time the loan was taken. The documents in question were issued on his behalf by Messrs Nordin Hamid & Co but he did not supply the information to them. The persons who supplied the information to Messrs Nordin Hamid & Co were the Melaka Branch of the plaintiffs and no evidence was adduced to show that they had or might be supposed to have had personal knowledge of the information supplied as required by s. 73A(1)(a)(ii). Be that as it may, the existence of personal knowledge may be inferred from the circumstances of a particular case as authorised by s. 73A(5). In *Knight (deceased) and Others*

v. David (deceased) and Others [1971] 3 All ER 1066 the court had regard to the nature of the document which was brought into existence pursuant to statutory directions and the lapse of time since its making and inferred that this condition had been satisfied. In this case, in the absence of any special circumstances, I do not think that it would have been difficult for the plaintiffs to establish this issue by calling the officer concerned from its Melaka Branch to give the required evidence. Therefore this is not a proper case where the existence of personal knowledge may be inferred. I must add that the fact that PW2 had personal knowledge of the matters is irrelevant for this purpose as he was not the supplier of the information. It must be noted that s. 73A(1)(a)(ii) is confined in its operation to the actual supplier of the information and not anybody else. It is quite clear that the Melaka Branch, in supplying the information, acted as the intermediary of PW2. It must be further noted that s. 73A(1)(a)(ii) has no special provision to salvage information supplied by intermediaries as in s. 4(1) of the English Civil Evidence Act 1968 which reads as follows:

> Without prejudice to s. 5 of this Act, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record complied by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.

Accordingly, since no specific provision has been made for intermediaries in s. 73A as in its English counterpart the Melaka Branch must be treated as an ordinary supplier of information which must have had, or might reasonably be supposed to have had personal knowledge of the matters dealt with in the documents to render them admissible. The plaintiffs have failed to establish this ingredient.

(d) The statement must not have been made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish

A person interested is someone who had a substantial material interest in the outcome of the proceedings pending or anticipated when the statement was made. This is the crucial occasion to determine the question of interest and not the time when the statement is tendered in evidence (see *Cartwright v. Richardson (w) & Co Ltd* [1955] 1 All ER 742). In *Evon v. Noble* [1949] 1 KB 222 Birkett J said that, in order that a person should come outside the

category of those interested, he must be "completely detached, judicial, impartial, independent." Sholl J said in *Tobias v. Allen (No 2)* [1957] VR 221 at p. 223:

> ... it is my opinion sufficient to constitute a disqualifying interest within the meaning of the sub-section if a person's conduct is likely to be called in question in the pending or anticipated litigation, or his interest is likely to be affected – if, in short, anything is shown which is reasonably calculated to affect the impartiality of the person making the statement.

The judgment of the Court of Appeal in *Bearmans Ltd v. Metropolition Police District Receiver* [1961] 1 All ER 304 leans strongly in favour of the view that there must be a real likelihood of bias before the maker of a statement can be said to be a person interested. The materiality must be substantial. Thus, in *In the Estate of Pocoe* [1956] P 110 Sachs J refused to exclude an account of an interview with a testator prepared by a solicitor who might have benefited from the success of the action to the extent of being instructed to do probate work. In *Wentworth v. Rogers (No 10)* [1987] 8 NSWLR 398 it was held that a solicitor recording instructions is not a person interested. I agree with this view wholeheartedly as a solicitor is an officer of the court and his role when representing a client is to ensure that justice is done irrespective of whether the outcome of the proceeding is in favour of his client or not. Thus the notices, having been prepared by a solicitor, are not those made by a person interested within the meaning of s. 73A(3). The entries in the AR cards would clearly not have been made by persons interested within the meaning of the subsection.

(e) The maker of the statement must be dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success

This is the proviso to s. 73A(1) which dispenses with the condition that the maker of the statement shall be called as a witness subject to fulfillment of the requirements stipulated therein. The proof of matters such as reasonable practicability to ensure the attendance of a witness who is beyond the seas, inability to find and identify witnesses with reasonable diligence are not mere formalities but depends on concrete evidence; the burden of proof of such matters is on the tendering party (see *Downs Irrigation Co-op Association Ltd v. National Bank of Australasia (No 2)* [1983] 1 Qd R 475; *Kantros v. Symons* [1978] 34 ALR 342). In this case the plaintiffs are seeking to have the notices tendered in evidence on the ground that the maker "... is beyond the seas and

it is not reasonably practicable to secure his attendance ... .” English cases such as *Rasool v. West Midlands Passenger Transport Executive* [1974] 3 All ER 638 and *Piermay Shipping Co v. Chester* [1978] 1 WLR 411 which say that on proof that the maker of a statement is abroad, it is unnecessary to show that any efforts have been made to secure his attendance as a witness have to be read with caution as the language used in the Civil Evidence Act 1968 is disjunctive unlike the similar words in s. 73A(1)(b) which are conjunctive. Thus where it is claimed that a witness is beyond the seas it must also be established that it is not reasonably practicable to secure his attendance. I have discussed the evidence adduced by the plaintiffs in proof of this issue when I dealt with s. 32 in an earlier part of the judgment. For similar reasons it is my view that the plaintiffs have not established that Mr Thavarajah is not available. Of course, with regard to the AR card no attempt was made to adduce any evidence insofar as this condition is concerned.

My conclusion was that the plaintiffs had only successfully proved that the statements were made in a document; that the AR cards were originals; that the notices form part of a record purporting to be a continuous record; that the notices and AR cards were made in the performance of a duty; and that the statements in the notices and AR cards were not those made by a person interested while the other ingredients of s. 73A which I have discussed had not been proved. I therefore ruled that the documents were inadmissible pursuant to this section also.

Be that as it may, the evidential value of the entries on the AR cards require some consideration. I pause for a moment to mention that evidence of a statement made to a witness by a person who is not himself called as a witness will amount to hearsay only if it is sought to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. This rule was stated in the celebrated case of *Subramaniam v. PP* [1956] MLJ 200 where LMD de Silva said at p. 222:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

In this connection I shall consider whether the fact that the defendant’s name and address appear on the AR cards which have not been admitted can be used to show that the notices were delivered to the Defendant based on the

principle established in *R v. Rice* [1963] 1 QB 857. In that case it was relevant to establish that the accused had flown from London to Manchester. It was held that it was permissible to do so by putting in evidence an air ticket with *Rice's* name on it. The court said that the ticket was inadmissible hearsay insofar at it was tendered for the purpose of showing that a man named Rice booked the ticket, but that it was part of the general circumstances from which the jury might infer that Rice was on the aircraft, having regard to the inherent probability that a ticket bearing the name Rice would be carried by a man of that name. Then came the judgment of the House of Lords in *Myers v. DPP* [1965] AC 1001 which did not expressly comment on the correctness of *R v. Rice*. In *Myers* case the prosecution alleged that the accused disguised stolen cars by changing the registration numbers and other identification numbers, substituting the appropriate numbers of wrecked cars which he had purchased. The accused's case was that the cars he had sold were not stolen but were renovated wrecks. The prosecution called an employee of the manufacturers of the stolen cars who produced microfilm records purporting to show, *inter alia*, the cylinder block numbers on the cars sold by the accused. The microfilms were of cards compiled by various workmen during the course of manufacture. The witness was in no way concerned with the compilation. The House of Lords held that the entries on the cards were assertions by the unidentifiable men who made them that they had entered numbers which they had seen on the cars. The evidence was therefore ruled as hearsay and inadmissible. Cases such as *Re Gardner* [1968] 13 FLR 345 and *R v. Romeo* [1982] 30 SASR 243 have held, rightly in my opinion, that *R v. Rice* is incompatible with Myers. Useful reference may also be made to *Sim Tiew Bee v. PP* [1973] 2 MLJ 200 where Ismail Khan CJ (Borneo) said at pp. 202 – 203:

> The last question is whether the words "Sim Tiew Bee, Sibu" on the gunny sacks (exh. P6 (1-3) are admissible as evidence of the name of the consignee of the 10 cases without calling the makers thereof. In the case of *Patel v. Controller of Customs* [1965] 3 All ER 593 the appellant was convicted of making a false declaration on a customs import entry in respect of five imported bags of coriander seed. Instead of declaring the origin of the seed to be Morocco, he declared the origin of the seed to be India, contrary to s. 116 of the Fiji Customs Ordinance. He was convicted. On appeal to the Privy Council, Lord Hodson said:
>
> > ... The only evidence purporting to show that this entry was false is the legend 'produce of Morocco' written on the bags. Their Lordships are asked by the respondent to say that the inference can be drawn that the goods contained in the bags were produced in Morocco. This they are unable to do. From an evidentiary point of view the words are hearsay and cannot assist the prosecution. This matter need not be elaborated

> in view of the decision of the House of Lords in *Myers v. Director of Public Prosecutions* [1964] 2 All ER 881, given after the Fiji Courts had considered the case. The decision of the House however makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as labels or markings ... . Nothing here is known of when and by whom the markings on the bags were affixed and no evidence was called to prove any fact which tended to show that the goods in question in fact came from Morocco ... .
>
> These words "To Sim Tiew Bee" are labels or markings on the exh. P6 (1-3) and by themselves are not evidence that the appellant was the consignee of the goods.

Thus the entries on the AR cards require to be proved in order to establish what is contained on them. In any event the AR cards on their own will prove precious little in the absence of evidence to show that they relate to the notices of demand.

After I had made the ruling on the admissibility of the documents sought to be admitted in evidence the plaintiffs called another witness. He is Amardas s/o Jethanand (PW3), advocate and solicitor, who was employed as a legal assistant in the firm of Messrs Nordin Hamid and Co in their Melaka office from 23 January 1990 to 20 February 1992. He was the only legal assistant in the firm at that time. When ID15 was shown to him he said that to the best of his knowledge it was signed by him. He added that it was not sent out by him but by the office boy. In cross-examination he said that as far as its posting is concerned he has no personal knowledge of that fact. The exhibit was duly marked as P15. The carbon copy of P15 which was sent to the plaintiffs was marked as P21. The plaintiffs then closed their case. The defendant gave evidence himself and he did not call any other witnesses. He denied having received a copy of P15. In his cross-examination several documents were shown to him. With regard to ID7 he said that the rubber stamp "Yau Jiok Hua & Co" on it is the name of his firm. He said that the signature on ID7 is that of a member of his firm in all probability. When ID10 was shown to him he said that the rubber stamp appearing on it is that of his office. He said that in all probability it was signed by his servants or agents and when they signed it they would have been authorised to do so. With regard to ID6, ID8, ID9A & B and ID11 he said that he did not receive them. He said that ID12 and ID14 are not signed by him and he cannot identify the signatures on them. With regard to ID18 he said that he cannot recognise the signature on it. Furthermore the rubber stamp on it does not carry an address which it usually does. Learned counsel for the plaintiffs then applied for ID7 and ID10 to be marked as exhibits. The defendant objected. In considering the objection raised I took into account the ease with which

the defendant identified the signatures on ID7 and ID10 as being that of his employees as opposed to the signatures on the other documents which he could not identify. Obviously the defendant would have been acquainted with the signatures of his staff in the exhibits to enable him to identify them the way he did. Section 47 of the Act provides that when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to have been written or signed, that it was or was not written or signed by that person, is a relevant fact. This is one of the permissbile methods of proving a signature (see *Law of Evidence* by Monir 10th Edn p 637). A signature may also be proved by admission of the person against whom it is tendered (see *Barindra v. R* 14 CWN 1114). ID7 and ID10 were tendered against the defendant and his evidence on the signatures appearing in them amounts to an admission that they were signed on his behalf by his staff. Accordingly, I admitted ID7 and ID10 and caused them to be marked as exhs. P7 and P10 as I was satisfied that they were signed by members of the defendant's firm who had been duly authorised to do so. It thus becomes necessary to consider the effect of exhs. P15, P21, P7 and P10 on the case for the plaintiffs.

Exhibit P15 and Exhibit P21

P15 is the notice of demand issued on 2 August 1990 and P21 is a copy of it sent to the plaintiffs. In his submission learned counsel for the plaintiffs contended that the proper admission of P15 and P21 coupled with ID16 is sufficient to enable the court to infer that P15 must have been received by the defendant in the ordinary course of things. In response to this the defendant contended that there is no evidence to show that a copy of P15 was sent to him as PW3 had said in cross-examination that he has no personal knowledge as to whether a copy of P15 was sent to the defendant. The defendant added that in order to prove posting of the notice of demand the office boy who was in charge of posting letters in Messrs Nordin Hamid & Co ought to have been called as a witness. With regard to learned counsel's reliance on ID16 the defendant contended that as it has not been properly proved it should be discounted on the strength of *PP v. Datuk Haji Harun bin Haji Idris and Ors* [1977] 1 MLJ 180. The defendant concluded by submitting that there is no evidence to show that a copy of P15 was sent to him and thus the question of him having received it does not arise.

In my opinion the admission of P15 and P21 only show that a notice of demand was prepared in respect of the amount due from the defendant and that a copy of it was received by the plaintiffs. No admissible evidence was adduced by the plaintiffs to establish that P15 was served on the defendant.

In order to prove service of P15 on the defendant the AR card in respect of it must have been properly admitted in evidence. That was not done by the plaintiff. In the absence of any evidence to show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand on the defendant it would have been sufficient for the plaintiffs to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority (see *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 1 MLJ 413). No such evidence was adduced by the plaintiffs in respect of P15. The evidence of PW3 does not assist in showing that P15 was posted as he had expressly stated in cross-examination that he has no personal knowledge of the posting of the letter. As there is no evidence to show that the notice of demand was posted to the defendant there can be no presumption to show that it was received by him.

Exhibit P7 and Exhibit P10

P7 is the AR card in respect of the alleged posting of ID6 while P10 is the AR card in respect of the alleged posting of ID8 and ID9. In his submission learned counsel for the plaintiffs contended that P7 and P10 are conclusive to show that ID6 and ID9 were received by the defendant. In his reply the defendant contended that the burden is on the plaintiffs to establish that copies of ID6 and ID9 were in fact sent in respect of P7 and P10. He said that as ID6 and ID9 have not been proved they must be discounted based on *PP v. Datuk Haji Harun bin Hj Idris and Ors* [1977] 1 MLJ 180. Accordingly, he said, there is no evidence to show the nature of the documents delivered in respect of both the exhibits. He further contended that apart from the signatures and rubber stamps on the exhibits all other written and type-written words on them should be excluded as they constitute hearsay based on *Sim Tiew Bee v. PP* [1973] 2 MLJ 200.

In my view P7 and P10 do not, on their own, assist the plaintiffs in any way. As the documents relating to the two exhibits have not been proved they only establish that two postal articles were received by the servants or agents of the defendant. The AR cards on their own do not prove the contents of the two postal articles. The plaintiffs ought to have called the clerk from Messrs Nordin Hamid & Co who was responsible for posting letters to testify on the two postal articles. Even then such evidence would only establish that the exhibits were in respect of a notice of demand which would not establish the case for the plaintiffs in the absence of proof of execution of the notice of demand.

In the premises the exhibits admitted in evidence do not establish service of the notice of demand on the defendant. Be that as it may, even if it can be argued that the plaintiffs have led sufficient evidence to prove service of the notice of demand on the defendant through the post such service does not constitute good service in the light of the requirement of personal service of the document on the facts of this case. The case for the plaintiffs has been conducted wholly on the basis that service by post is the proper mode of service of the notice of demand. If there had been agreement on that mode of service then, as I said earlier, proof that the notice was duly posted would suffice to prove service. In my opinion the onus is on the plaintiffs to first establish the proper mode of service of the notice before proceeding to prove service by such method. If, in fact, service of the notice by post had not been agreed upon by the parties then the attempts made by the plaintiffs to prove service by such manner would be an exercise in futility. Normally an agreement between parties may contain terms dealing with the mode of service of the notice of demand, for example, there may be a clause providing that the notice will be deemed to have been made within a particular period after an envelope containing it and addressed to the debtor at his last known address has been posted. In this regard useful reference may be made to *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 1 MLJ 413 where Mohamed Dzaiddin SCJ in writing for the (then) Supreme Court said at p. 419:

> It must, however, be borne in mind that the mode of service of a notice of demand in a given case will depend on the words of the relevant clause in the guarantee, as it is quite common for the guarantee to expressly provide the manner in which a notice is to be given to the guarantor.

Where the agreed mode of service is by post then proof that the envelope containing the notice was posted will suffice to preclude the debtor from raising the defence that no demand was actually received by him (see *Canadian Imperial Bank of Commerce v. Haley* [1979] 100 DLR (3d) 470; *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 1 MLJ 413). In this case there is no evidence of any agreement between the parties with regard to the mode of service of the notice of demand. The only provision on this issue is contained in the Letter of Offer which merely states that repayment shall be on demand without condescending to particularise the form of service. This, to my mind, means that the notice of demand must be served personally on the defendant in the absence of any agreement to the contrary. In saying this I draw support from the book entitled *Law of Banking* 3rd Ed Vol II by Poh Chu Chai where the learned author in writing on service of notices of demand in guarantee cases says at pp. 352 - 353:

When a guarantee imposes a duty on a creditor to give a notice of demand to a guarantor, there is a presumption that the notice will be served on the guarantor personally unless the manner in which the notice is to be served is spelt out in the guarantee. The requirement for personal service imposes an additional burden on a creditor. In practice it is more usual for a guarantee to provide for the form and manner in which a notice of demand is to be served on a guarantor. Very often, a guarantee will allow a creditor to serve a notice of demand on a guarantor either by ordinary mail or by registered mail instead of by way of personal service. This mode of service is equivalent to a form of substituted service. Under this mode of service, a creditor discharges his duty to a guarantor the moment a notice of demand is duly addressed and posted. The risk of a notice going astray and not getting to a guarantor owing to a miscarriage by the post office falls on the guarantor as the parties have by agreement thrown the risk of miscarriage on the guarantor. Equally, if a guarantor avoids the receipt of a notice of demand, either by changing his address without notifying the creditor or refuses to accept delivering of the notice, he is deemed to have notice of the letter of demand the moment a notice duly addressed is posted.

On the manner of effecting personal service *The Supreme Court Practice 1985* Vol 1 says this at p. 996:

To effect personal service the clerk or other person entrusted with the task should first satisfy himself that he has found the right man. He should then hand to or leave with the person to be served a copy of the writ. If the person served will not take the copy, he should tell him what it contains and leave it as nearly in his possession or control as he can.

Putting a copy through a crevice of the door of the room in which the defendant is and telling him that it is a copy of the writ, is not sufficient (*Christmas v. Eicke* [1848] 6 D. & L. 156); nor is the sending of a copy by post in a letter which the defendant refuses to take in (*Redpath v. Williams* [1826] 3 Bing. 443). If the defendant refuses to take the copy it is not necessary to leave it in his actual corporeal possession, but it is sufficient to inform him of its nature and throw it down in his presence (per Patteson J in *Thomson v. Pheney* [1832]; yet this must be done under such circumstances as to bring the case within the above rule. See *Rose v. Kempthorne* [1910] 103 LT 730. Therefore, where the defendant was at an upper window of a house, and the process server, who was outside, called out to him, telling him that he had a writ against him and held up a copy for him to see, and then threw it down in the presence of defendant's wife, it was held that this was not sufficient (*Heath v. White* [1844] 2 D & L 40). So where a person put the copy into a basket which had been put over the garden wall by a servant of the defendant, whom he immediately afterwards heard saying to the servant "take it back, I won't have it," and the servant subsequently told the person

that she had given the copy to the defendant, it was held that this was not a personal service (*Goggs v. Huntingtower (Lord)* [1844] 12 M. & W. 503). It is not sufficient to hand the defendant the copy writ enclosed in an envelope without informing him that it is a copy writ (*Banque Russe v. Clarke* [1894] 1 QB 487, per Chitty, LJ).

The copy of the writ must be left with, and not merely shown to, the defendant (*Worley v. Glover* [1730] 2 Stra. 877) even though he refuses to take it. Where the person serving brought it away the service was held under the circumstances to be defective (*Pigeon v. Bruce* [1818] 8 Taunt. 410).

It is therefore clear that there is a marked distinction between personal service and substituted service by post. In the case of the former there must be actual personal service on the defaulter while in the case of the latter proof of posting of the notice will suffice. I therefore hold that in the absence of any agreement to the contrary between the parties in this case there must be personal service of the notice of demand on the defendant. The evidence adduced shows that the mode of service attempted by the plaintiffs was through the post. Consequently, it is my view that the plaintiffs have failed to establish service of the notices on the defendant. In any event they have failed to prove service of the notice of demand even on the mode of service adopted by them.

As the plaintiffs have failed to prove that the defendant has been served with a notice of demand in respect of their claim against him they have not succeeded in establishing a cause of action against him. In the upshot I dismiss the plaintiffs' claim with costs.